International Union of Elevator Constructors, Local 8 *and* National Elevator Bargaining Association (Otis Elevator Co.). Case 20–CD–745

February 19, 2010

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). National Elevator Bargaining Association (NEBA), on behalf of Otis Elevator Company (Employer), filed a charge on August 18, 2009, alleging that International Union of Elevator Constructors, Local 8 (Union) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees of certain flooring contractors. The hearing was held September 9 and 10, 2009, before Hearing Officer Scott M. Smith. Thereafter, NEBA and the Employer, and the Union each filed a posthearing brief.[1]

The National Labor Relations Board[2] affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.[3]

I. JURISDICTION

The parties stipulated at the hearing that, during the preceding 12 months, the Employer had gross revenues in excess of $500,000 and, at its California locations, purchased goods and services valued in excess of $50,000 directly from points outside the State of California. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties also stipulated, and we find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer manufactures, sells, installs, modernizes, services, and repairs elevators, escalators, and related equipment, and is a member of NEBA, a multiemployer bargaining association and a signatory to NEBA's collective-bargaining agreement with the Union. This agreement provides that "the assembly of all cabs complete" is performed exclusively by elevator mechanics represented by the Union. The Employer's contracts with general contractors on major projects, however, typically exclude the installation of elevator flooring. When it is time to install the elevator flooring, flooring contractors install it and the Employer's mechanics perform other tasks.

In approximately December 2008, a California State elevator inspector informed the Employer that State law required the Employer to have a licensed mechanic present during the installation of elevator flooring. Pursuant to this understanding, the Employer began assigning its licensed union mechanics to perform "standby" work during the installation of elevator flooring. Performing "standby" work on one project, according to Kenneth Greenling, the Employer's construction superintendent, entailed sitting on a bucket watching while the floors were installed.

General Contractors HMH Builders and Turner Construction awarded the Employer the work of elevator installation at Lodi Memorial Hospital (Lodi) and Mercy San Juan Medical Center (Mercy), respectively. Excluded from both of the Employer's contracts was the installation of elevator flooring. HMH Builders awarded the installation of elevator flooring work at Lodi to Capitol Commercial Flooring and Capitol City Tile and Marble. Turner Construction awarded the installation of elevator flooring work at Mercy to B.T. Mancini.

The parties' dispute over flooring installation and standby work at Lodi and Mercy began around August 2009. Patrick McGarvey, the Union's business manager, maintained that the flooring installation was the Union's work and they wanted that work, according to testimony from Christian Grenier, the Employer's labor relations manager. Moreover, McGarvey stated in his August 7, 2009 letter to Grenier that the Union "does not wish to be a party" to standby practices which could result in legal

[1] The flooring contractors did not file a posthearing brief.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Teamsters Local 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

[3] We grant NEBA's and the Employer's unopposed motion to correct the record.

issues for union members. McGarvey reiterated in his August 21, 2009 letter to Grenier that "[o]ur position is that Otis cannot require its employees to perform 'standby work' which exposes them to legal liability for lending their individual certifications to persons who have not been appropriately certified." Consistent with those statements, the Union directed its members not to perform standby work, but instead to do the flooring work themselves.

Around mid-August 2009, the Employer assigned union mechanics Matthew Andries and Lee Moore to work "standby" at Lodi and Mercy while employees of the flooring contractors installed the elevator flooring. Both employees refused to perform the "standby" work. Greenling testified that Moore told him he could not perform the work because "I get in trouble if I don't do it for you and I can get fined by the union if I do it."

On August 20, 2009, the Union filed a grievance with the Employer for violating the collective-bargaining agreement by "assisting general contractors to use tradesmen other than Elevator Constructors to perform work specified in Article IV Paragraph 2; specifically car floor covering at Lodi Memorial Hospital and Mercy San Juan Hospital."

B. Work in Dispute

The parties did not stipulate to the work in dispute. The notice of hearing described the disputed work as "[t]he installation of elevator flooring at Lodi Memorial Hospital located at 975 South Fairmont Street, Lodi, California 95240; and at Mercy San Juan Medical Center located at 6501 Coyle Avenue, Carmichael, California, 95608." No party disputes this description.

C. Contentions of the Parties

The Union argues that the notice of hearing should be quashed because there is no jurisdictional dispute. According to the Union, it made no claims to the flooring installation work. Moreover, the Union argues, the Employer is actually seeking a ruling on a contractual dispute involving whether it can assign "standby" work to its employees under the terms of its collective-bargaining agreement with the Union. Thus, the Union asserts, that type of dispute cannot be resolved under Section 10(k) of the Act. The Union further asserts that it has validly disclaimed any interest in the work in dispute, and that the parties' 1999 letter agreement provides an alternative avenue of relief for the parties.

NEBA and the Employer contend that there are competing claims for the work in dispute and that there is reasonable cause to believe that the Union violated Section 8(b)(4)(D) of the Act. They further argue that there is no agreed-upon method for voluntary adjustment of the dispute. On the merits, NEBA and the Employer argue that the factors of employer preference and past practice, area and industry practice, relative skills and training, and economy and efficiency of operations support an award to employees of the flooring contractors.[4] They further contend that a broad award is warranted because the Union has demonstrated a proclivity to engage in unlawful conduct to force the assignment of the disputed work to employees it represents.

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 825 (Structure Tone, Inc.*), 352 NLRB 635, 636 (2008). This requires finding that there is reasonable cause to believe that there are competing claims for the disputed work and that a party has used proscribed means to enforce its claim to the work in dispute. Id. Additionally, the Board will not proceed under Section 10(k) if there is an agreed-upon method for the voluntary adjustment of the dispute. Id. On the record, we find that this standard has been met.

1. Competing claims for work

We find that the employees of the flooring contractors have claimed the disputed work by their performance of it. See *Operating Engineers Local 513 (Thomas Industrial Coatings*), 345 NLRB 990, 992 fn. 6 (2005) ("performance of work by a group of employees is evidence of a claim for the work by those employees, even absent a specific claim").

We also find reasonable cause to believe that the Union has claimed the disputed work for its employees. As set forth above, Grenier testified that McGarvey maintained that the flooring installation was the Union's work and that they wanted that work. Although McGarvey denied making such statements, Grenier's testimony is sufficient to establish reasonable cause to believe that the Union made a claim for the disputed work. See *Carpenters (Tangram Flooring)*, 354 NLRB No. 104, slip op. at 3 (2009). Moreover, as described above, the Union filed a grievance with the Employer effectively claiming the flooring installation work. See *Laborers Michigan District Council (Walter Toebe Construction)*, 353 NLRB No. 114, slip op. at 2 (2009) (evidence of competing claims consisted of union business agent's statement requesting work be assigned to union, and grievance challenging the employer's assignment of work to an-

[4] The Union's posthearing brief did not address the merits of the dispute.

other union); *Plumbers District Council 16 (L & M Plumbing)*, 301 NLRB 1203, 1204 (1991) (union's grievance against employer for allegedly violating the agreement between them by subcontracting work to employees not represented by union was, in effect, a demand for the work).

The Union alternatively argues that even if it made a claim for the disputed work, it disclaimed the work through statements that McGarvey made at the hearing and in letters that McGarvey sent to the Employer.[5] For a disclaimer to be effective, it must be a clear, unequivocal, and unqualified disclaimer of all interest in the work in question. Conduct inconsistent with a disclaimer militates against its effectiveness. Thus, an otherwise clear and unequivocal disclaimer may be rendered ineffective by subsequent union conduct manifesting a continuing jurisdictional claim. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005).

Here, the Union's pending grievance effectively claiming the work represents a continuing jurisdictional claim to the disputed work that renders its disclaimers ineffective.[6] See *Plumbers District Council 16 (L & M Plumbing)*, supra (union's continued pursuit of grievance inconsistent with its assertion that it disclaimed interest in the disputed work).

2. Use of proscribed means

There is reasonable cause to believe that the Union engaged in proscribed means, namely threatening and then effectuating a work stoppage, in order to enforce a claim to the disputed work. As discussed above, the Union effectively stated in its correspondence with the Employer that it does not want its members to perform standby work and the Employer could not require that they do so. The Union's grievance states that it believes the Employer assisted the General Contractors to deprive the Union of the flooring installation work. Thus, the Union directed its members not to standby and watch others perform their work, but to perform the work themselves, according to Grenier. Consequently, when the Employer assigned "standby" work to Moore and Andries, they refused. Moore refused in part, according to Grenier, for fear of being fined by the Union if he performed the work.

Here, the Union directed its proscribed activity at the Employer rather than at the General Contractors, the parties that employed the flooring contractors who performed the work in dispute. Nevertheless Section 8(b)(4)(D) was intended to remedy such a situation. As the Board has explained:

> Section 8(b)(4)(D) makes it an unfair labor practice for a labor organization to engage in proscribed activity with an object of "forcing or requiring *any employer* to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." The Board has interpreted this language as showing the "clear intent of Congress to protect not only employers whose work is in dispute from such [proscribed] activity, but *any* employer against whom a union acts with such a purpose."

Structure Tone, supra, 352 NLRB at 636, quoting *Plumbers Local 195 (Gulf Oil)*, 275 NLRB 484, 485 (1985) (emphasis in original). See also *Longshoremen ILA Local 1911 (Cargo Handlers)*, 236 NLRB 1439, 1440 (1978).

Here, it is clear that an object of the Union's work stoppage against the Employer was to force the reassignment of the disputed work.[7]

3. No voluntary method of adjustment of dispute

In order for an agreement to constitute an agreed-upon method for voluntary adjustment, all parties to the dispute must be bound to that agreement. *Operating Engineers Local 150, AFL-CIO (Nickelson Industrial Service),* 342 NLRB 954, 955 (2004).

The Union argues that the 1999 agreement between the Union and the National Elevator Industry, Inc. (NEII), a multiemployer bargaining association of which the Employer was a member, provides an alternative avenue of relief for the parties.[8] To the extent that the Union is

[5] During the hearing, McGarvey testified that the Union makes no claim to flooring installation work when it is not awarded to the Employer. Additionally, in his August 21, 2009 letter to Grenier, McGarvey wrote that the Union's dispute is "not over flooring installation work Otis was not awarded." Last, the Union argues that McGarvey clearly disclaimed the work by stating in his August 7, 2009 letter to Grenier, "[i]f you want someone other than an employee we represent to engage in such practices [referring to standby work], that is your business; but this union does not wish to be a party to such practices which, again, could result in legal issues for our individual members."

[6] Accordingly, the Board need not pass on whether McGarvey's statements, standing alone, constituted valid disclaimers.

[7] The Union's refusal to perform standby work at Lodi and Mercy constituted proscribed means because an object of this conduct was to force the reassignment of the work in dispute. Accordingly, we do not address the question of whether the Union could refuse to perform standby work in the absence of an unlawful object, including whether the Employer is entitled to assign standby work under the terms of the parties' collective-bargaining agreement. Nor do we address any of the legal arguments underlying the Union's grievance.

[8] That agreement states that "[s]hould any local union(s) engage in a work stoppage against a NEII employer in conjunction with a dispute over the assignment of cab interior work, the international office agrees to order the local union(s) to return to work and resolve the dispute in the manner set forth in the agreement." According to the Employer,

claiming that the 1999 agreement constitutes a voluntary method of adjustment of dispute, we disagree. The flooring contractors were not a party to that agreement and thus are not bound by it. Thus, because not all the parties to the dispute were bound to that agreement, we find that there is no voluntary method for adjustment of this dispute.[9]

Based on the foregoing, we find reasonable cause to believe that there are competing claims for the disputed work and that a violation of Section 8(b)(4)(D) has occurred. We further find that no voluntary method exists for the adjustment of the dispute. Accordingly, we find that this dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting),* 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction),* 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute:

1. Certification and collective-bargaining agreements

At the hearing, the parties stipulated that the Employer is not failing to conform to an order of certification of the Board determining the bargaining representative for the employees performing the work in dispute. As stated above, the Employer is a signatory to a collective-bargaining agreement providing that union mechanics perform the "assembly of all cabs complete." Nevertheless, the flooring installation work has not been awarded to the Employer in this case, and therefore the Employer does not have the ability to assign the work to its employees. No collective-bargaining agreement covers the employees of the flooring contractors. Accordingly, we find that this factor does not favor awarding the disputed work to either employees represented by the Union or employees of the flooring contractors.

2. Employer preference and past practice

The General Contractors prefer that the work in dispute continue to be performed by the employees of the flooring contractors. Although the Employer did not explicitly state its preference, the Employer has historically deferred to the General Contractors' preference for hiring employees of the flooring contractors. Indeed, the Employer's contracts to install and construct elevators on major projects routinely exclude flooring installation. David Holliman, a 29-year employee of the Employer and its current regional field operations manager, testified that when it is time for the flooring to be installed in the elevator, "the flooring contractor comes in and installs the flooring" while the mechanic performs other work on the job site. Thus, although the Employer did not affirmatively state its preference, overall, this factor favors an award of the disputed work to the employees of the flooring contractors.

3. Area practice

George Williamson and Cliff Kunkel, representatives from the General Contractors, and even McGarvey, the Union's business manager, all testified that based on their experience, when it came time to install the elevator flooring, the employees of specialty flooring contractors installed it and the mechanics performed other tasks. Greenling, with experience as the Employer's construction superintendent in other locations, testified to the same. Therefore, we find that this factor favors an award of the disputed work to the employees of the flooring contractors.

4. Relative skills and training

Williamson and Kunkel testified that flooring installers must have certain training and experience qualifications. For installation of rubber flooring on the Lodi project, the Employer provided evidence of training sessions offered by the flooring manufacturer for installers to "become proficient" in rubber flooring installation. For installation of ceramic tile on the Lodi project, General Contractor HMH Builders required its flooring installer to have a "minimum of 5 years successful documented experience with work comparable to that required for this Project." Kunkel, Turner Construction's representative for the Mercy project, similarly testified that a typical minimum qualification required on flooring projects would be a 5-year history of installing work similar to the specifications in their agreements, as well as licensing requirements. Both representatives testified that the employees of the flooring contractors for the Lodi and Mercy projects met their requirements.

The record also indicates that the Union's apprenticeship program for mechanics trains them to install certain types of flooring. There was also testimony of instances on other projects where union mechanics actually installed certain types of flooring. Nevertheless, we find that this factor only slightly favors an award of the dis-

however, it withdrew from NEII for collective-bargaining purposes in 1987.

[9] Nor would resolution of the Union's grievance constitute a voluntary method of adjustment of dispute, as the flooring contractors were also not parties to the grievance.

puted work to the employees of the flooring contractors because the record does not indicate that the mechanics met the General Contractors' specific experience requirements for the Lodi and Mercy projects.

5. Economy and efficiency of operations

Williamson testified that the lobby flooring typically matches the elevator flooring. Indeed, Kunkel testified that the employees of the flooring contractors install the flooring for most of the building. Given this uniformity in installation methods and materials that already exists in the building, it appears more efficient for employees of the flooring contractors to also install the elevator flooring. See *Structure Tone, Inc.,* supra, 352 NLRB at 638 (economy and efficiency of operations factor favored awarding employee delivering materials to all but one floor the work of also delivering materials to that floor).[10] Accordingly, we find that this factor favors an award of the disputed work to the employees of the flooring contractors.

CONCLUSION

After considering all the relevant factors, we conclude that employees of the flooring contractors are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference and past practice, area practice, relative skills and training, and economy and efficiency of operations.[11]

F. Scope of the Award

NEBA and the Employer request a broad award covering the work in dispute. They argue that in addition to the work at Lodi and Mercy, the Union claimed the flooring installation work at a third job site in Sacramento, 500 Capitol Mall, and that the totality of its conduct establishes a propensity for violating the Act and that the dispute is likely to recur at other locations.

For the Board to issue a broad award, there must be evidence that the disputed work has been a continuing source of controversy in the relevant geographic area and that similar disputes are likely to recur. There must also be evidence that demonstrates that the charged party has a proclivity to engage in unlawful conduct to obtain work similar to the disputed work. *Carpenters Local 13 (First Chicago NBD Corp.)*, 331 NLRB 281, 284 (2000).

Here, there is testimony that in addition to the incidents at Lodi and Mercy, McGarvey claimed the flooring installation work as the Union's work at the "500 Capitol Mall" project and told the Employer that the mechanics would not perform standby work at that location. These few instances, none in defiance of a Board order, fall short of establishing a "proclivity." Id. Therefore, we conclude that a broad order is inappropriate and the determination is limited to the controversy that gave rise to this proceeding. Id.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Capitol Commercial Flooring, and Capitol City Tile and Marble are entitled to perform the installation of elevator flooring at Lodi Memorial Hospital located at 975 South Fairmont Street, Lodi, California, 95240; and employees of B.T. Mancini are entitled to perform the installation of elevator flooring at Mercy San Juan Medical Center located at 6501 Coyle Avenue, Carmichael, California, 95608.

2. International Union of Elevator Constructors, Local 8 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Otis Elevator Company to assign the disputed work to employees represented by it.

3. Within 14 days from this date, International Union of Elevator Constructors, Local 8, shall notify the Regional Director for Region 20 in writing whether it will refrain from forcing Otis Elevator Company, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Dated, Washington, D.C. February 19, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[10] Although California law may require that a mechanic be present to perform "standby" work, the record does not specifically demonstrate, as discussed above, that the Union mechanics had the flooring contractors' specialized experience required to perform the disputed work.

[11] In so concluding, we reject the Union's argument that a Board order here would be ineffectual because the flooring installations at both Lodi and Mercy have now been completed. The mere fact that disputed work has been completed does not render a jurisdictional dispute moot where nothing indicates that similar disputes are unlikely to recur. *Iron Workers California District Council (Madison Industries)*, 307 NLRB 405, 407 fn. 5 (1992). There is no such evidence here. To the contrary, the Union is still pursuing its grievance alleging that the Employer assisted the General Contractors to use tradesmen other than Union mechanics to perform the flooring installation work.